UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **JOANE LISA BOUDREAU**, Debtor.	Case No. **04-62410-13**

MEMORANDUM OF DECISION

At Butte in said District this 29th day of July, 2005.

In this Chapter 13 case, a hearing was held at Missoula after due notice on May 5, 2005, on Debtor's motion, filed March 16, 2005, requesting sanctions against Riverside County, California, Department of Child Support Services ("Riverside DCSS") for civil contempt and willful violation of the automatic stay under 11 U.S.C. § 362(h). The Debtor Joane Lisa Boudreau ("Lisa" or "Debtor") appeared and testified at the hearing, represented by attorney Nikolaos G. Geranios ("Geranios"). Riverside DCSS failed to appear at the hearing as ordered by this Court in its Order entered March 30, 2005. Debtor's Exhibits ("Ex.") 1, 2, 3, 4, 5, 6, 7, 8, and 9 were admitted into evidence, and at Debtor's request the Court took judicial notice of her Schedules. At the conclusion of the Debtor's case-in-chief the Court granted Debtor's counsel Geranios ten (10) days in which to file an affidavit of attorney's fees and costs incurred by the Debtor in relation to her motion for sanctions, after which the matter would be taken under advisement. Geranios' affidavit of fees and costs has been filed and reviewed by the Court, together with the record and applicable law. This matter is ready for decision. For the reasons set forth below a separate Judgment will be entered imposing sanctions against Riverside DCSS for

willful violations of the stay by postpetition garnishment, and in addition a separate Order shall be entered imposing sanctions against Riverside DCSS for civil contempt of this Court's Orders.

This Court has jurisdiction over this Chapter 13 case under 28 U.S.C. § 1334(a). Debtor's motion for sanctions is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision includes the Court's findings of fact and conclusions of law. These contempt proceedings are governed by F.R.B.P. 9020 and 9014.

FACTS

Lisa Boudreau is 40 years old, divorced, and lives in Bonner, Montana. She is employed as a supervisor at Albertsons in Missoula. Lisa testified that she has been paying child[1] support to Riverside DCSS for years, that the original amount of child support she owed Riverside DCSS was $1,500, and that she kept up with her payments unless she was out of work. Riverside DCSS obtained a wage garnishment order on Lisa's regular paycheck at Albertsons, which garnished her wages.

Lisa filed a voluntary Chapter 13 petition, Schedules, Statements and Plan on August 4, 2004. Schedule E lists Dept of Riverside DCSS as a creditor holding a priority claim for child support arrears in the amount of $3,400. The address listed for that creditor on Schedule E is 2041 Iowa Ave, Riverside, CA 92507.

Geranios sent Ex. 1, a letter advising of Lisa's bankruptcy dated August 4, 2004, by facsimile to Riverside DCSS advising it of her bankruptcy petition, the automatic stay, and that

[1]Schedule I lists one dependent, a son, age 19.

her Chapter 13 Plan provides for payment of Lisa's back child support obligation[2]. The official Notice of Commencement of the case was mailed to creditors, including Riverside DCSS[3], on August 7, 2004. The Notice advises creditors in bold print: "Creditors May Not Take Certain Actions", followed by the explanation: "The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized." Page 2 of the Notice provides further explanation:

> Prohibited collection actions against the debtor . . . are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.

No contention exists on the record that Riverside DCSS did not receive notice of Lisa's bankruptcy filing[4].

On August 10, 2004, Riverside DCSS sent Ex. 2, a letter terminating the wage garnishment order, to Dollar Plus Inc. ("Dollar Plus"), Lisa's former employer. Lisa testified that she has not worked for Dollar Plus for two years, and that the garnishment of her wages earned

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[2]The original Plan filed August 4, 2004, provides for payment of her priority claim for back child support in the amount of $3,400.

[3]The Notice of Commencement was sent to Dept of Riverside DCSS at 2041 Iowa Ave, Riverside CA 92507-2414. Except for the "-2414", the address on the Notice of Commencement is the same as the address provided on Riverside DCSS's Proof of Claim No. 7 as where notices should be sent, and the same as on Schedule E.

[4]The Declaration of Karen Renee Langehennig attached to Riverside DCSS's motion to continue (Docket # 40) states that Riverside DCSS received notice of Lisa's bankruptcy on August 10, 2004.

from Albertsons by Riverside DCSS continued for a month and a half after she filed her bankruptcy petition. On August 19, 2004, Geranios sent a letter to Riverside DCSS, Albertsons, and other creditors warning against wage garnishments and other violations of the stay which "may be actionable pursuant to 11 U.S.C. § 362(h) or as contempt of the court and punished accordingly .... **THIS IS THE FINAL WARNING YOU WILL RECEIVE. PLEASE GOVERN YOURSELVES ACCORDINGLY**." Ex. 3. Notwithstanding Ex. 3, Lisa testified that Riverside DCSS continued garnishment of her wages from Albertsons, and that the garnishment did not cease until October 4, 2004.

On September 20, 2004, Geranios sent another letter, Ex. 4, to Riverside DCSS and Albertsons, advising Riverside DCSS that it sent Ex. 2 to the wrong employer and clarifying that Albertsons is the employer that is garnishing Lisa's wages. Geranios asked Riverside DCSS to send the garnishment termination letter to Albertsons, even including the address of Albertsons' payroll department in Boise, Idaho. Ex. 4. Riverside DCSS still could not get it right. On September 23, 2004, Riverside DCSS sent another garnishment termination letter to Dollar Plus, in Columbia Falls, Montana, Ex. 5, while Lisa's wages at Albertsons continued to be garnished.

Lisa testified that the continued garnishment of her wages prevented her from paying other bills after she filed her petition, causing late fees to be incurred and stress. She testified she lost at least 8 hours of work because of phone calls and having to meet with Geranios regarding the continued garnishment, that she lost another week's worth of wages from the petition date until the hearing from the garnishment, and that the dispute caused her to cry a couple of times. She testified that Riverside DCSS's attitude toward her was like she was an ant. Lisa testified she earns $11.08 per hour. From Lisa's testimony, the Court calculates the total amount of

wages Lisa lost over 48 hours caused by Riverside DCSS as $531.84.

On September 28, 2004, Riverside DCSS finally sent Albertsons a garnishment termination letter. Ex. 6. Lisa testified the garnishment stopped October 4, 2004.

The hearing on confirmation was set for November 4, 2004, by Order (Docket #9) entered September 20, 2004, which was served on the parties including Riverside DCSS on September 22, 2004. That Order advises the parties that if no objections to confirmation have been filed at least 10 days prior to the date of the hearing and the Trustee files a consent, the Court will confirm the Plan without a hearing.

The Debtor filed an amended Plan on September 28, 2004, which was served on the creditors including Riverside DCSS. The amended Plan provides for payments over 48 months, and at paragraph 2(d) states that allowed priority claims will be paid, as is required by 11 U.S.C. § 1322(a)(2), and further states: "Debtor specifically asserts that she has two priority claims: one for back Child Support in the amount of $3,400.00; and one for Federal taxes in the amount of $933.12." The Chapter 13 Trustee filed a consent to confirmation on September 30, 2004. Riverside DCSS did not file an objection to confirmation, but sent Geranios Ex. 7, received October 4, 2004, in which it stated the amount of its claim against Lisa as $4,517.17, including $989.44 in adjustments postpetition from 8/25/04 to 9/25/04. Based upon the Trustee's consent, and with no other objections having been timely filed, the Court entered an Order confirming the Plan on October 26, 2004.

Riverside DCSS filed Proof of Claim No. 7 on November 18, 2004, asserting a priority claim in the amount of $4,535.37. On December 2, 2004, the Debtor filed an objection to Riverside DCSS's Proof of Claim No. 7 on the grounds it is overstated. Debtor's objection

includes the notice required by Montana Local Bankruptcy Rule (Mont. LBR) 3007-2 which gave Riverside DCSS ten (10) days to respond and request a hearing, the failure of which "shall be deemed an admission that the relief requested should be granted." Debtor's objection was served on Riverside DCSS at its address of record, and requested that Riverside DCSS's priority claim in the amount of $4,535.27 be disallowed and allowed as a priority claim in the amount of $3,497.35. Debtor's objection further states: "Additionally, debtor intends to file an adversary proceeding against this creditor for repeated violations of the stay."

Riverside DCSS failed to respond to Debtor's objection to its Proof of Claim. After the notice period expired the Court entered an Order (Docket #23) on December 16, 2004, sustaining Debtor's objection and allowing Riverside DCSS's Proof of Claim No. 7 as a priority claim in the amount of $3,497.35. That Order was not appealed by Riverside DCSS, nor did it seek reconsideration or other relief. Despite that Order, Lisa testified that Riverside DCSS has never acknowledged the $3,497.35 allowed amount of its priority claim. On March 3, 2005, Geranios received Ex. 8, in which Riverside DCSS, notwithstanding this Court's Order allowing its priority claim in the amount of $3,497.35 and the Orders confirming Debtor's Chapter 13 Plan, stated the amount of its support claim as of 2/18/05 as $4,676.17. On Ex. 9 received by Geranios April 4, 2005, Riverside DCSS asserted its claim in the amount of $4,707.97.

The Trustee filed a motion to vacate the confirmation Order on February 18, 2005, based on Riverside DCSS's priority claim. Debtor filed a second and then a third amended Plan, to the latter of which the Trustee consented and Debtor's Third Amended Plan was confirmed on April

6, 2005[5].

Debtor filed her motion for sanctions against Riverside DCSS on March 16, 2005, alleging contempt for violations of the automatic stay by said creditor garnishing her wages after the petition date and ignoring the Court's Order sustaining Debtor's objection to Riverside DCSS's claim. The attached certificate of service signed under penalty of perjury states that Debtor's motion was served on Riverside DCSS at its address of record and at an alternative post office box address. The motion includes a notice in conformity with Mont. LBR 9013-1(d) granting Riverside DCSS 10 days to respond and request a hearing, the failure of which "shall be deemed an admission that the relief requested should be granted." As with Debtor's objection to its Proof of Claim, Riverside DCSS failed to respond and request a hearing on Debtor's motion for sanctions. The Court entered an "Order and Notice of Contempt Proceeding" on March 30, 2005 (Docket #32), advising Riverside DCSS of the conduct alleged by the Debtor for which she seeks sanctions, and setting a hearing on May 5, 2005, "at which hearing Riverside County Department of Child Support Services **SHALL APPEAR** and show cause why it should not be held in civil contempt and subject to sanctions for violation of the automatic stay and failure to comply with this Court's Order entered December 16, 2004." That Order was served on Riverside DCSS, but it failed to appear at the May 5, 2005, hearing in compliance with the Court's Order.

On May 3, 2005, Riverside DCSS filed a motion dated April 28, 2005, to continue the

[5]A subsequent modification of Debtor's Plan was filed June 13, 2005, and confirmed by Order entered June 27, 2005, with the Trustee's consent and with no objection by creditors, including Riverside DCSS, after notice.

hearing and civil contempt proceeding[6]. The accompanying declaration states that Riverside DCSS ceased all enforcement actions, that it was not served with Debtor's motion for sanctions, and intends to respond. The Court denied Riverside DCSS's motion to continue by Order entered May 4, 2005, finding that Riverside DCSS failed to show good cause[7] to continue the hearing, which was held as scheduled on May 5, 2005. Riverside DCSS failed to appear as ordered by the Court.

Geranios' affidavit states that his attorney's fees and costs incurred in relation to Debtor's motion for sanctions are $1,058.40 and $12.80, respectively. The Court has reviewed the billing statement accompanying Geranios' affidavit and finds the requested fees and costs reasonable and supported by adequate documentation. With respect to Lisa's testimony of the continued garnishment and her damages, the Court having observed Lisa's demeanor while testifying under oath, finds that Lisa is a credible witness. *In re Taylor*, 514 F.2d 1370, 1373-74 (9th Cir. 1975); *See also Casey v. Kasal*, 223 B.R. 879, 886 (E.D. Pa. 1998). Her testimony of the postpetition garnishments is corroborated by the exhibits admitted into evidence.

DISCUSSION

I. Automatic Stay – § 362(a).

The Debtor's filing of her Chapter 13 bankruptcy petition on August 4, 2004, gave rise to

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[6]The Court's Order of March 30, 2005, ordering Riverside DCSS to appear in bold print and capital letters, is attached to Riverside DCSS's motion to continue.

[7]Mont. LBR 5071-1, "Request for Continuance" governs continuances and requires the party requesting a continuance to file the motion at least 3 business days prior to the scheduled hearing, advise the Court of the affected party's response to the request or what attempts have been made to gain each party's consent. Riverside DCSS's motion for continuance was not filed 3 business days prior to the hearing, and failed to advise the Court of the Debtor's consent. Debtor filed an objection to Riverside DCSS's motion for continuance.

an "automatic stay". 11 U.S.C. § 362(a). The Ninth Circuit construed the automatic stay in *In re Gruntz*, 202 F.3d 1074, 1081-82 (9th Cir. 2000):

> The automatic stay is self-executing, effective upon the filing of the bankruptcy petition. *See* 11 U.S.C. § 362(a); *The Minoco Group of Companies v. First State Underwriters Agency of New England Reinsurance Corp.* (*In re The Minoco Group of Companies*), 799 F.2d 517, 520 (9th Cir.1986). The automatic stay sweeps broadly, enjoining the commencement or continuation of any judicial, administrative, or other proceedings against the debtor, enforcement of prior judgments, perfection of liens, and "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6).

The Ninth Circuit Bankruptcy Appellate Panel ("BAP") explained the automatic stay in *Balyeat Law Offices, P.C. v. Campbell*, 14 Mont. B.R. 132, 136-37 (9th Cir. BAP 1995):

> "Congress' intent in enacting § 362(a) is clear--it wanted to stop collection efforts for all antecedent debts." *Gonzales v. Parks*, 830 F.2d 1033, 1035 (9th Cir. 1987) (*quoting In re M. Frenville Co., Inc*., 744 F.2d 332, 334 (3rd Cir. 1984). *cert. denied*, 469 U.S. 1160 (1985). "Section 362(a) automatically stays a wide array of collection and enforcement proceedings." *Pennsylvania Dept. of Public Welfare v. Davenport*, 49 5 U.S. 552, 560 (1990). See also *Delpit v. C.I.R.*, 18 F.3d 768, 770 n.1 (9th Cir. 1994). "Section 362 is extremely broad in scope and should apply to almost any type of formal or informal action." *Id.* at 771 (*quoting 2 COLLIER ON BANKRUPTCY*, § 362.04 at 362-34 (15th ed. 1993). It "prohibits acts that, but for the stay, would be lawful." *In re Zartun*, 30 B.R. 543, 545 (9th Cir. BAP 1983). The stay is created for the benefit of the debtor, the debtor's property and the debtor's estate. *In re Casqul of Nevada, Inc.*, 22 B.R. 65, 66 (9th Cir. BAP 1982).

The Ninth Circuit has repeatedly reiterated the broad scope of the automatic stay as "one of the most important protections in bankruptcy law." *See In re Risner*, 317 B.R. 830, 835 (Bankr. D. Idaho 2004), quoting *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214-15 (9th Cir. 2002); *Hillis Motors, Inc. v. Hawaii Auto Dealers' Assoc.*, 997 F.2d 581, 585 (9th Cir. 1993). Actions taken in violation of the automatic stay all are void, not merely voidable. *Gruntz*, 292 F.3d at 1082; *40235 Washington Street Corp. v. Lusardi*, 329 F.3d 1076, 1082 (9th Cir. 2003); *Schwartz v. United States*, 954 F.2d 569, 570-71, 575 (9th Cir.1992); *In re Deines*, 17 Mont. B.R. 114, 115

(Bankr. D. Mont. 1998); *Hillis Motors, Inc. v. Hawaii Auto Dealers' Assoc.*, 997 F.2d at 586.

At footnote 5 *Risner* quotes *Eskanos v. Adler* that: "Consistent with the plain and unambiguous meaning of the statute, and consonant with Congressional intent, we hold that § 362(a)(1) imposes an affirmative duty to discontinue post-petition collection actions." 317 F.3d at 835 n.5, quoting *Esklanos v. Adler*, 309 F.3d at 1215. A recent district court decision from Arizona explains:

> The Ninth Circuit's holding in *Eskanos* is consistent with established precedent in other jurisdictions. Based on the language of § 362(a)(1), many courts have emphasized the obligation of creditors to take affirmative action to terminate or undo any action that violates the automatic stay. *See, e.g., Patton v. Shade*, 263 B.R. 861 (C.D.Ill.2001); *Utah State Credit Union v. Skinner (In re Skinner)*, 90 B.R. 470, 480 (D.Utah 1988); *In re McCall-Pruitt*, 281 B.R. 910, 911-912 (Bankr.E.D.Mich.2002); *In re Briskey*, 258 B.R. 473, 476 (Bankr.M.D.Ala.2001); *Rainwater v. Alabama (In re Rainwater)*, 233 B.R. 126, 156 (Bankr.N.D.Ala.1999); *vacated on other grounds*, 254 B.R. 273 (N.D.Ala.2000); *Kirk v. Shawmut Bank (In re Kirk)*, 199 B.R. 70, 72 (Bankr.N.D.Ga.1996); *Connecticut Pizza, Inc. v. Bell Atlantic-Washington, D.C., Inc. (In re Connecticut Pizza, Inc.)*, 193 B.R. 217, 228 (Bankr.D.Md.1996); *James v. Draper (In re James)*, 112 B.R. 687, 700 (Bankr.E.D.Pa.1990), *aff'd in part, vacated in part on other grounds*, 120 B.R. 802 (E.D.Pa.1990), *judgment rev'd on other grounds*, 940 F.2d 46 (3d Cir.1991); *Clemmons v. United Student Aid Funds, Inc. (Matter of Clemmons)*, 107 B.R. 488, 490 (Bankr.D.Del.1989); *Adams v. Philadelphia Hous. Auth. (In re Adams)*, 94 B.R. 838, 851 (Bankr.E.D.Pa.1989).
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> The responsibility is placed on the creditor and not on the debtor because to place the burden on the debtor to undo the violation " 'would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate.' " *Ledford v. Tiedge (In the Matter of Sams)*, 106 B.R. 485, 490 (Bankr.S.D.Ohio 1989) (quoting *In re Miller*, 22 B.R. 479, 481 (D.Md.1982)). "One of [the] purposes of [the automatic stay] is to protect the debtor from having to convince a state court judge that the state court matter should not proceed." *In re Sutton*, 250 B.R. at 774 (citing *In re Weisberg*, 218 B.R. 740, 752 (Bankr.E.D.Pa.1998)). Though "state court judges generally refrain from proceeding once they are made aware of a bankruptcy filing, the burden is on the creditor not to seek relief against a debtor in violation of the stay." *Id.* As the bankruptcy court in *Elder v. City of Thomasville (In re Elder)*, 12 B.R. 491 (Bankr.M.D.Ga.1981) pointed out: "The creditor sets in motion the process. The creditor is very much in the driver's seat and very much controls what is done thereafter if it chooses. If the continuation is to

> be stayed, it (the creditor) cannot choose to do nothing and pass the buck to the debtor."

In re Johnston, 321 B.R. 262, 283-84 (D. Ariz. 2005).

Under the above authority, Riverside DCSS had an affirmative duty to discontinue its garnishment of Lisa's wages at Albertsons, but failed. The Court acknowledges that Riverside DCSS attempted, by means of Ex. 2 and Ex. 5, to terminate the garnishment. Those termination letters, however, were sent to the wrong employer, Dollar Plus, and the garnishment and stay violations did not cease because Albertsons continued to garnish Lisa's wages for a month and a half after the petition date. Riverside DCSS failed its duty to discontinue postpetition collection actions in violation of the automatic stay under *Eskanos v. Adler.*

II. § 362(h) – Willful Violation of the Stay.

This Court construed § 362(a) & (h) in *In re Reece*, 15 Mont. B.R. 474, 477-78 (Bankr. D. Mont. 1996):

> As to the relevant Bankruptcy Code provisions, when a debtor files a bankruptcy petition, a stay is automatically imposed applicable against all creditor collection activity. 11 U.S.C. § 362(a). The stay is effective upon the date of the filing of the petition; and does not depend on formal service of process. *In re Smith*, 876 F.2d 524, 526 (6th Cir.1989). Furthermore, the Code requires the creditor, pursuant to § 362(d), to take affirmative action to obtain relief from stay from a bankruptcy court. In the absence of affirmative action on the part of the creditor to obtain relief from stay, § 362(a) prevents the creditor from attempting to enforce its rights against a debtor. See *In re Sharon*, 200 B.R. 181, 187 (Bankr. S.D.Oh. 1996).
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> Turning to the law governing violation of the automatic stay, 11 U.S.C. § 362(h), this Court has held:
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> > To be actionable, a violation of the automatic stay must be "willful." In *In re Bloom*, 875 F.2d 224, 227 (9th Cir.1989), the term "willful", as used in § 362(h) was addressed and defined: "This circuit has not defined 'willful' as it is used in subsection (h). A useful definition, which we now adopt, was provided by the bankruptcy court for the district of the District of Columbia: A 'willful

> violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded. *Inslaw, Inc. v. United States* (*In re Inslaw, Inc.*,), 83 B.R. 89, 165 (Bankr.D.D.C.1988)."

In re Christopherson, 8 Mont. B.R. 213, 111 B.R. 920, 922 (Bankr. D. Mont. 1990).

The Court further explained:

> "[T]he relief provided for willful violation of the stay under 11 U.S.C. § 362(h) is mandatory" since § 362(h) supplements but does not replace the pre-existing remedy of civil contempt. *In re Lile*, 103 B.R. 830, 836 (Bankr.S.D.Tex.1989). Thus, when a party acts with knowledge of a pending bankruptcy, a violation of the stay is considered willful and damages must be assessed, *Id*. at 836, for "[T]he creditor takes the risk of being assessed for damages if he fails to obtain clarification from the bankruptcy court." *Id*. at 837, citing *In re Clark*, 49 B.R. 704, 707 (Bankr.D.Guam 1985); and *In re Pody*, 42 B.R. 570, 573-574 (Bankr.N.D.Ala.1984). *Lile*, supra, at 841 further states that where a Debtor is forced to resort to the courts to enforce his right, attorney's fees should be awarded to the Debtor under § 362(h). See also, *In re Price*, 103 B.R. 989 (Bankr.N.D.Ill.1989).

Id. at 923.

The above test for willful violation under § 362(h) – (1) that the creditor knew of the stay, and (2) the creditor's actions which violated the stay were intentional, was repeated in *In re Roman*, 283 B.R. 1, 8 (9th Cir. BAP 2002), which also noted the above standard that lack of specific intent to violate the stay is not a required element to find a willful violation, and that "it is clear that once a creditor or actor learns or is put on notice of a bankruptcy filing, any actions intentionally taken thereafter are 'willful' within the contemplation of § 362(h)." *Risner*, 317 B.R. at 835; *Eskanos & Adler*, 398 F.3d at 1214-15. In *In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003),

the Ninth Circuit noted that § 362(h) provides for damages for willful violation of the stay upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were willful. *See Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995) (cited in *Roman*, 283 B.R. at 12-13). Further, a party with knowledge of bankruptcy proceedings is charged with knowledge of the automatic stay. *Dyer*, 322 F.3d at 1191, *citing Pinckstaff v. United States*, 974 F.2d 113, 115 (9th Cir. 1992).

Riverside DCSS claims in its motion to continue that it ceased collection actions, but the evidence admitted at trial shows that Riverside DCSS failed to send Albertsons a garnishment termination letter until September 28, 2004, despite repeated requests by Debtor's counsel, and that the Debtor's wages at Albertsons continued to be garnished until October 4, 2004. No dispute exists in the record that Riverside DCSS knew of the automatic stay, or that the garnishment of Lisa's wages at Albertsons was intentional, and therefore the Court concludes that the continued garnishment of the Debtor's wages from Albertsons by Riverside DCSS was willful.

The Court recognizes that Riverside DCSS attempted unsuccessfully to stop the garnishment, and that as a governmental entity it may have numerous employees involved in handling the case, but that is no excuse for its incompetent handling of the Debtor's bankruptcy and sending termination letters to the wrong employer, even after Debtor's attorney spelled out in exact detail where the termination letter should be sent and after Riverside DCSS was clearly garnishing a subsequent employer, Albertsons, and not the prior employer, Dollar Plus. Riverside DCSS cannot escape the consequences of willful violations of the stay simply by claiming mistake.

In rejecting an argument that notice was sent to an improper corporate address, one court aptly noted:

> [W]hile an octopus may have eight legs, it is still the same octopus. As a result, bankruptcy law not only requires, but demands, that companies, whether large or small, have in place procedures to ensure that formal bankruptcy notices sent to an internally improper, but otherwise valid corporate address are forwarded in a prompt and timely manner to the correct person/department. As a consequence, Ocwen's defense that its collection efforts against the Debtors were merely the result of a flaw in its internal organizational structure--the argument that the right hand does not know what the left hand is doing--falls on deaf ears.
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> This rule has been universally followed by other bankruptcy courts, and is really just an extension of the principle that corporations are expected to have in place procedures to ensure that they comply with all areas of the law.

In re Perviz, 302 B.R. 357, 367 (Bankr. N.D. Ohio 2003). Such reasoning is analogous to a government entity.

The notices, letters, motions and plans in this case were sent to Riverside DCSS at the address it listed on its Proof of Claim where notices should be sent. Like corporations, government entities are required to have in place procedures to ensure that bankruptcy notices are forwarded to the correct person, and that they comply with all areas of the law. *See id.* In the instant case Riverside DCSS had to know that Lisa's employer was Albertsons, simply because Albertsons was garnishing her wages subject to a wage garnishment order necessarily obtained in favor of Riverside DCSS. That Riverside DCSS's procedures resulted in sending its garnishment termination letters to the wrong address reflects either inadequate procedures, improper training or inadequate supervision, none of which excuse Riverside DCSS from liability for its willful albeit mistaken violations of the stay.

Simply put, the evidence is uncontroverted that Riverside DCSS received notice that Lisa had filed a Chapter 13 petition, but its garnishment of her wages from Albertsons continued for a month and a half. An innocent stay violation can become willful if the creditor fails to remedy the violation after receiving notice of the stay. *In re Del Mission Ltd.*, 98 F.3d 1147, 1151 (9th Cir.

1996); *Abrams v. Southwest Leasing and Rental Inc. (In re Abrams)*, 127 B.R. 239, 241-44 (9th Cir. BAP 1991). Riverside DCSS's continued garnishment of the Debtor's wages from Albertsons was intentional and with knowledge of the bankruptcy stay, and as such constitute willful violation of the stay. *Eskanos & Adler*, 398 F.3d at 1214-15; *In re Dyer*, 322 F.3d at 1191; *Roman*, 283 B.R. at 8; *Risner*, 317 B.R. at 835; *Reece*,15 Mont. B.R. at 477-78.

In re Forty-Five Fifty-Five, Inc., 111 B.R. 920, 923 (Bankr. D. Mont. 1990) explains that "when a party acts with knowledge of a pending bankruptcy, a violation of the stay is considered willful and damages must be assessed." *In re Lile*, 103 B.R. at 836. A party's violation of the stay may be willful even if a creditor believed itself justified in taking an action found to be violative of the automatic stay. *In re Cinematronics, Inc.,* 111 B.R. 892, 900 (Bankr. S.D. Cal. 1990), the court wrote:

> The creditor takes a calculated risk where it undertakes to make its own determination of what the stay means. *In re Gray*, 97 B.R. 930, 936 (Bankr. N.D. Ill. 1989). To disagree with Theodore Roosevelt, at least when the automatic stay is concerned, it is far better to be a "timid soul" who seeks a court determination of the limits of the stay, rather than to fail "while daring greatly".

The BAP explained in *Campbell*, 14 Mont. B.R. at 149-50:

> Section 362(h) provides:
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> > An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
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> "Whether the party believes in good faith that it had the right to property is not relevant to whether the act was willful or whether compensation must be awarded." [*In re Abrams*, 127 B.R. 239, 243 (9th Cir. BAP 1991)]. A willful violation of the stay occurs where the party accused of such violation acts intentionally with the knowledge that the automatic stay is in place. Specific intent to violate the stay is not required. *Bloom*, 875 F.2d at 226.

In re McMillan, 18 Mont. B.R. 21, 29 (Bankr. D. Mont. 1999).

Under the above authority, § 362(h) permits a person injured by any willful violation to recover actual and punitive damages. *Eskanos & Adler*, 309 F.3d at 1215. In the instant case, however, the Bankruptcy Code's provision governing sovereign immunity and its waiver, 11 U.S.C. § 106, provides at § 106(a)(3) that: "The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, *but not including an award of punitive damages*." (Emphasis added). By filing Proof of Claim No. 7, Riverside DCSS waived its state sovereign immunity, if it even possessed such immunity. *See Gardner v. New Jersey*, 329 U.S. 565, 573, 67 S.Ct. 467, 472 91 L.Ed. 504 (1947) ("It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure."); *In re Jackson*, 184 F.3d 1049, 1050 (9th Cir. 2002). The California statutes creating local child support agencies clearly delineate that the counties in California shall maintain such agencies. CAL. FAM. CODE §§ 17304, 17400. ". . . [L]ocal governments do not enjoy [the] immunity" provided by the Eleventh Amendment. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1040 (9th Cir. 2003). *See also Bd. of Trs. of Univ. of Ala. V. Garrett*, 531 U.S. 356, 369, 121 S.Ct. 955, 965 (2001). This Court, given the filed proof of claim by Riverside DCSS, concludes that it is unnecessary to consider the five-factor test used in *Savage*.[8]

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[8] "To determine whether a governmental entity is an arm of the state for Eleventh Amendment purposes, we examine the following factors: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity. *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir.1988). In making this determination, a

Thus, § 106(a)(3) prohibits an award of punitive damages against Riverside DCSS as a governmental entity, but does not prohibit an award of compensatory damages against Riverside DCSS under § 362(h). The BAP has noted that a debtor's attorney fees and costs are "actual damages" under § 362(h). *Roman*, 283 B.R. at 10. An award of attorney's fees and costs in addition to actual damages is mandatory upon finding a willful violation of the stay under § 362(h). *Roman*, 283 B.R. at 9, 15; *In re Walsh*, 219 B.R. 873, 876 (9th Cir. BAP 1998). The Court having found willful violations of the stay by Riverside DCSS in its postpetition garnishment, the Debtor is entitled to an award of her actual damages for lost wages shown by the uncontroverted testimony in the amount of $531.84 and her attorney's fees and costs of $1,071.20.

III. Emotional Distress.

In *Dawson v. Wash. Mutual Bank*, 390 F.3d 1139, 1148-49 (9th Cir.2004), the Ninth Circuit held that under § 362(h), emotional distress damages are cognizable if a party provides clear evidence to establish that significant harm occurred as a result of the violation. Fleeting or trivial anxiety or distress does not suffice, instead an individual must suffer significant emotional harm. *Id.*, at 1149.

Debtor seeks damages for emotional distress. At trial Geranios argued that this case stands out because of the abuse of the Debtor by a government entity, disregard of court orders and his cease and desist demands. The disregard of court orders will be addressed below.

To support an award for emotional distress it must be clear that an individual suffered significant emotional harm caused by the violation of the stay. *Dawson*, 390 F.3d at1149. An individual may establish emotional distress in several different ways, including: Corroborating

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court examines the manner in which state law treats the entity. *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977))."

medical evidence, testimony of family members, friends or coworkers as to manifestations of mental anguish which clearly establishes that significant emotional harm occurred; or, in cases where the violator engaged in egregious conduct, without corroborative evidence where the individual suffers significant emotional distress and the circumstances surrounding the violation make it obvious that a reasonable person would suffer significant emotional harm. *Dawson*, 390 F.3d at, 1149-51.

Evidence establishing significant emotional distress may include testimony that a debtor suffered headaches, loss of sleep, or doctor visits such as noted in *Dawson*, 390 F.3d at 1149-50, citing *Varela v. Ocasio (In re Ocasio)*, 272 B.R. 815, 821-22 (1st Cir. BAP 2002) (per curiam). Lisa offered no corroborating medical evidence of health care professionals. She testified that the continuing garnishment caused her stress and caused her to break down and cry a few times.

The general rule in Montana is that a defendant must take the plaintiff as he finds her and accept liability for all consequences flowing from the injury. *Lutz v. U.S.,* 685 F.2d 1178, 1186-87 (D. Mont. 1982), citing W. Prosser, The Law of Torts, § 43 at 260-63 (4th ed. 1971). In discussing emotional damage awards this Court noted in *Miller v. Snavely*, 19 Mont. B.R. 300, 354-55, quoting Ninth Circuit cases:

> While objective evidence requirements may exist in other circuits, such a requirement is not imposed by case law in either Washington, the Ninth Circuit, or the Supreme Court. *See* [*Herring v. Dept. of Social and Health Services*, 81 Wash.App.1, 914 P.2d 67, 77-83 (Wash. Ct. App. 1996)] (upholding damage award in excess of $1,000,000, including $550,000 for emotional damages, in disability discrimination and retaliation case based on testimonial evidence of emotional harm); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir.1985) (upholding emotional damages based solely on testimony); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir.1994) (noting that emotional damages may be awarded based on testimony alone or appropriate inference from circumstances); *Carey v. Piphus*, 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042,

> 55 L.Ed.2d 252 (1978) (noting that emotional distress damages are "essentially subjective" and may be proven by reference to injured party's conduct and observations by others). See also *Merriweather v. Family Dollar Stores*, 103 F.3d 576, 580 (7th Cir.1996) (noting that plaintiff's testimony can be enough to support emotional damages).

Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 513 (9th Cir. 2000).

In *Johnson v. Hale,* a housing discrimination case out of Billings, Montana, the Ninth Circuit wrote:

> [C]ompensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms. *Id.* at 1193 (citing *Phiffer v. Proud Parrot Motor Hotel*, 648 F.2d 1353548, 552-53 (9th Cir.1980); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir.1974)). We also emphasized that "both plaintiffs provided detailed and substantial testimony to support their claims that they suffered emotional distress as a result of the Hales' discriminatory acts" and that "[t]he Hales offered no evidence to rebut this testimony."
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> *Johnson v. Hale*, 13 F.3d 1352–53.

In the instant case Lisa provided specific and credible testimony that she suffered significant emotional distress as a result of Riverside DCSS's willful violations of the stay, causing her to break down in tears. The Court finds Riverside DCSS liable for Lisa's emotional distress based upon her testimony and inference from the circumstances surrounding the violations which make it obvious that a reasonable person would suffer significant emotional distress from postpetition willful violations of the stay as shown by the evidence in the instant case. *See Dawson*, 390 F.3d at 1150-51; *Miller v. Snavely*, 19 Mont. B.R. at 354-55; *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d at 513; *Johnson v. Hale*, 13 F.3d 1352–53.

In *Dawson*, the Ninth Circuit noted that significant emotional harm may be readily

apparent even without corroborative evidence in circumstances which make it obvious that a reasonable person would suffer significant emotional harm. *Dawson*, 390 F.3d at 1150-51, citing *United States v. Flynn*, 185 B.R. 89, 93 (S.D. Ga. 1995) (affirming $5,000 award of emotional distress damages without corroborating testimony because "it is clear that appellee suffered emotional harm" when she was forced to cancel her son's birthday party because her checking account had been frozen, even though the stay violation was brief and not egregious). In the instant case the stay violations were not brief, lasting a month and a half after the petition date and Riverside DCSS prolonged its stay violations by incompetence even though Debtor's attorney spelled out exactly where to send the garnishment termination letter. Considering such facts in light of *Dawson* and the facts of *United States v. Flynn*, this Court awards the Debtor the sum of $2,000 in damages for the significant emotional distress Lisa suffered which she clearly established by her testimony and the circumstances as caused by Riverside DCSS's willful violations of the stay.

IV. Contempt.

Debtor requests sanctions against Riverside DCSS for contempt, based upon violations of this Court's Orders. The record shows that Riverside DCSS ignored not only this Court's Order (Docket # 23) which sustained the Debtor's objection to Proof of Claim No. 7, to which no objection was filed by Riverside DCSS nor any appeal taken and which allowed Riverside DCSS's priority claim in the amount of $3,497.35; but it also ignored this Court's Order confirming Debtor's Chapter 13 Plan and its treatment of Riverside DCSS's priority claim, both of which had res judicata effect on DCSS's claim which its subsequent notices sent to Debtor's attorney Geranios, Ex. 8 and 9, ignored. Riverside DCSS had notice of the Debtor's objection to its Proof

of Claim, and had notice of Debtor's Plans and the hearing on confirmation. Riverside did not respond or object, but ignored this Court's Orders sustaining Debtor's objection and allowing its priority claim in the amount of $3,497.35, and Order confirming Debtor's Plan, when it continued to send Debtor's attorney demands for greater amounts.

It is well established that principles of res judicata and finality, as partly codified in 11 U.S.C. § 1327, can make even "illegal" provisions of a Chapter 13 plan binding. *In re Brawders*, 325 B.R. 405, 410 (9th Cir. BAP 2005); *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir.1999) (student loan debt discharged by confirmation of Chapter 13 plan so providing, even though debt may have been nondischargeable); *Multnomah County v. Ivory (In re Ivory)*, 70 F.3d 73 (9th Cir.1995) (res judicata precluded collateral attack on confirmation order, despite possible jurisdictional error). Riverside DCSS was bound by this Court's Orders allowing its claim in a reduced amount and confirming its treatment in Debtor's Plan, but Riverside DCSS ignored the res judicata effect when it ignored the Court's Orders and demanded greater amounts for its priority claim. This conduct by Riverside DCSS constitutes contempt of court. Riverside DCSS demonstrated further contempt of this Court when it failed to comply with the Court's Order (Docket # 32) that it appear at the hearing on Debtor's motion for sanctions.

This Court addressed a motion for sanctions based upon violation of the discharge injunction in *In re Gomez*, 17 Mont. B.R. 166, 171-72 (Bankr. D. Mont. 1998), quoting *In re Killorn*, 16 Mont. B.R. 364, 366-68 (Bankr. D. Mont. 1998)):

> Contempt proceedings are governed by F.R.B.P. 9020. Prior to Congress reform of Rule 9020 in 1987, bankruptcy courts did not have the inherent power of contempt in the Ninth Circuit. *In re Sequoia Auto Brokers, Ltd. (Plastiras v. Idell)*, 827 F.2d 1281, 1284 (9th Cir. 1987). Subsequent to *Sequoia*, the United States Supreme Court held that courts created by Congress have inherent powers, unless Congress intentionally restricts those powers. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47, 111 S.Ct. 2123, 2134, 115 L.Ed.2d 27 (1991). The Ninth Circuit

later held that with Congress enacting Rule 9020 and § 105(a), *Chambers* supersedes *Sequoia* and bankruptcy courts have the inherent power to sanction for contempt. *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284-5 (9th Cir. 1996).

Rule 9020(b) provides that contempt "committed in a case or proceeding pending before a bankruptcy judge . . . may be determined only after a hearing on notice"

* * * *

Both the Discharge and § 524(a)(2) provide that the Discharge operates as an injunction, enjoining all creditors from commencing, instituting, or continuing any action or engaging in any act to collect discharged debts. *See, In re Raiman*, 172 B.R. 933, 936 (9th Cir. BAP 1994). Willful violation of the § 524(a)(2) injunction warrants the finding of contempt. *In re Andrus*, 184 B.R. 311, 315-16 (Bankr. N.D. Ill. 1995). To find a creditor in civil contempt the court must find that the offending party knowingly violated a definite and specific court order. *Id.*; *In re Johnson*, 148 B.R. 532, 538 (N.D. Ill. 1992). The burden under § 524(a)(2) is on the Debtors to prove the violation by clear and convincing evidence." *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982); *In re Keane*, 110 B.R. 477, 483 (S.D. Cal. 1990); *In re Andrus*, 184 B.R. at 315; *In re Ryan,* 100 B.R. 411, 417 (N.D. Ill. 1989). This Court can impose upon a creditor who violates the § 524(a)(2) injunction sanctions for civil contempt, which may consist of remedial and compensatory, but not punitive, sanctions. *Andrus*, 184 B.R. at 315; *In re Torres*, 117 B.R. 379, 382 (N.D. Ill. 1990); *In re Rainbow Magazine, Inc.*, 77 F.3d at 285.

Gomez continues:

> Other courts have long held that where a creditor has failed to comply with an order of discharge, civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. *In re Whitaker*, 16 B.R. 917, 923 (M.D. Tenn. 1982) (*citing McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 98 L.Ed. 599 (1948)). Civil contempt is therefore an appropriate sanction for a creditor's noncompliance with or violation of the Court's order of discharge. *Whitaker*, 16 B.R. at 923, *Matter of Holland*, 21 B.R. 681, 689 (N.D. Ind. 1982); *see, Matter of Batla*, 12 B.R. 397, 400-401 (Bankr. N.D. Ga.1981).
>
> Knowledge of the discharge order and knowingly violating it are necessary requirements for contempt. *Holland*, 21 B.R. at 689. A party's negligence or absence of intent to violate the discharge order is not a defense against a motion for contempt. *In re Atkins*, 176 B.R. 998, 1009-1010 (Bankr. D. Minn. 1994) (citations omitted).

17 Mont. B.R. at 172.

The above reasoning applies to Riverside DCSS's knowing violations of definite and specific court orders allowing its claim, confirming its treatment in Debtor's Chapter 13 Plan, and ordering it to appear. Riverside DCSS chose simply to ignore this Court's Orders, and the Court concludes that an appropriate remedial sanction in the amount of $500.00 should be imposed against Riverside DCSS in order to enforce compliance with this Court's Orders allowing its priority claim in the reduced amount as provided in Debtor's confirmed Plan.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334 and 157.

2. The pending Debtor's motion for sanctions is a core proceeding under 28 U.S.C. § 157(b).

3. The Debtor satisfied her burden of proof by a preponderance of the evidence to show that Riverside DCSS willfully violated the stay by continuing failing to cease post-petition garnishment of Debtor's wages, and that actual damages and attorney's fees and costs are appropriate as sanctions under 11 U.S.C. § 362(h), but not punitive damages.

4. Debtor satisfied her burden of proof by clear evidence which established that she suffered significant emotional distress, harm, and damages caused by and as a result of Riverside DCSS's willful violations of the automatic stay, which are cognizable under § 362(h). *Dawson v. Wash. Mutual Bank*, 390 F.3d 1139, 1146-50 (9th Cir. 2004).

5. Debtor satisfied her burden of proof by clear and convincing evidence that Riverside DCSS committed civil contempt of this Court by continuing to assert the full amount of its claim for past due child support in defiance of this Court's specific Order (Docket #23) and Orders

confirming Debtor's Plans, and by failing to comply with this Court's Order (Docket #32) to appear at the hearing on May 5, 2005, for which the Court deems an appropriate sanction to be the sum of $500.00 payment to the Clerk of the Bankruptcy Court.

IT IS ORDERED a separate Judgment shall be entered for the Debtor Joane Lisa Boudreau and against Riverside County, California, Department of Child Support Services ("Riverside DCSS") in the amount of $531.84 for willful violation of the automatic stay in violation of 11 U.S.C. § 362(h), plus attorneys fees in the amount of $1,058.40 and costs in the amount of $12.80 and damages for significant emotional distress in the amount of $2,000, for a total judgment amount of $3,603.04; and

IT IS FURTHER ORDERED a separate Order shall be entered granting Debtor's motion for sanctions against Riverside DCSS, for contempt of court, and directing Riverside DCSS to remit to the Clerk of the Bankruptcy Court the sum of $500.00 for its contempt of this Court's Orders.

BY THE COURT

Ralph B. Kirscher

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana